

APPENDIX.**ASSIGNMENTS OF ERROR.***Assignment of Error No. 1.*

The court erred in denying defendant's motion for a directed verdict at the close of the government's case because the evidence of the government failed to support the charges in the indictment against the defendant Molzahn.

Defendant's exception to the court's action will be found on page 149 of the Bill of Exceptions.

The only testimony in the government's case which created even a suspicion that Molzahn knew of and participated in the conspiracy is found in the recital by Pelypenko, an informer employed by the government, of an interview which he stated he had with Molzahn. This testimony (which appears on pages 17, 18 and 19) failed to establish knowledge of or participation in the conspiracy on the part of Molzahn.

Assignment of Error No. 2.

The court erred in permitting the witness Pelypenko to testify to the alleged conversations which he said he had had with three of the self-confessed conspirators—Kunze, Vonsiatsky and Willumeit—at the Bismarck Hotel in Chicago on July 26, 1941, because the conversations were hearsay as to the defendant, since there was no proof that up to the date mentioned Kunze, Vonsiatsky and Willumeit had formed or were engaged in the conspiracy, or that the defendant Molzahn knew of it and was participating therein.

Defendant excepted to the court's ruling (pp. 11-12).

The alleged conversations testified to by Pelypenko are to be found on pages 12, 13, 22 and 23.

Assignment of Error No. 3.

The court erred in admitting Exhibit 25, consisting of four written documents alleged to be credentials of Pelypenko as a Roman Catholic priest, because the documents were not properly authenticated, and were inadmissible as hearsay and likewise hearsay superimposed on hearsay. Defendant's counsel had no opportunity of cross examining the persons whose names were given as Pelypenko's sponsors. He was not entitled to the benefit of the alleged credentials.

Defendant objected to the court's action and exception was duly taken (p. 51).

The papers were described and read into the evidence (pp. 45-53 and 656-660).

Assignment of Error No. 4.

The court erred in permitting Willumeit to testify as to what Kunze said to Pelypenko concerning the defendant Molzahn at the Bismarck Hotel in Chicago on July 26, 1941, because the same was hearsay as to the defendant, since there was no proof that up to the time that Kunze was alleged to have made the statement Willumeit, Vonsiatsky and himself had formed or were engaged in the alleged conspiracy, or that the defendant knew of it or was participating therein.

Defendant objected to the court's action and exception was duly taken (p. 94).

The testimony objected to was as follows:

"Q. What did Kunze say to Father Pelypenko about the defendant Molzahn at this meeting?

Q. Will you answer that question, doctor? A. Mr. Kunze told Father Pelypenko that he was going to forward the passport pictures either to him or to Pastor Molzahn, that he was going to write to Pastor Molzahn that he wanted Pelypenko to meet Pastor Molzahn personally, and that Paston Molzahn would take care of everything" (p. 95).

Assignment of Error No. 5.

The court erred in admitting the alleged conversations which the witness Flatter said he had had with Molzahn on a trip to Europe in July, 1937, because the conversations, which are alleged to have been had, occurred about four years prior to the period of the conspiracy alleged in the indictment.

Defendant objected to the evidence and excepted to the court's ruling (p. 62), and the conversations appear on pages 63-73.

Assignment of Error No. 6.

The court erred in admitting Exhibits 34 and 35, because they were two letters alleged to have been written by Kunze subsequent to the period of the conspiracy.

Defendant objected to the admission of the letters (p. 145) and translations of them will be found on pages 146 and 147.

These exhibits were particularly and unduly prejudicial to defendant, because the body of the second letter contained a reference to "Kurt" and a postscript (p. 506) to the second letter in handwriting entirely different from Kunze's and signed "Kurt" seemed to refer to the defendant Kurt Molzahn, until the defense proved that the Kurt referred to was Kurt Tuermer of Mexico City, of all of which the government was well aware at all times.

Assignment of Error. No. 7.

The court erred in denying the motion of the defendant Molzahn at the conclusion of the trial for a directed verdict of not guilty, because the evidence did not support the indictment.

Defendant excepted to the court's action (p. 662).

The evidence offered in behalf of the defendant did not supply the lack of evidence in the government's case. Nothing was added that in any way proved Molzahn's

knowledge of and participation in the conspiracy. This was true also of the testimony in rebuttal and sur-rebuttal. In the course of the evidence for the defense, the defendant himself took the stand and denied the truth of the charges against him. A large number of witnesses also testified in his behalf, among whom were included three of the self-confessed conspirators named in the indictment, who, while awaiting sentence, by their testimony exonerated defendant.

Assignment of Error No. 8.

The court erred in denying the defendant's motion to set aside the verdict and grant a new trial, because the evidence did not support the indictment.

Defendant excepted to the court's action (pp. 667-669).

The judge should have set aside the verdict, it being clear that the jury had reached their conclusion by yielding to the war fervor that existed throughout the trial, rather than by a due consideration of the evidence.

WHEEFORE the defendant prays that the judgment of the District Court be reversed and that the defendant be found not guilty under the indictment.

Dated at Hartford this 27th day of November, 1942.

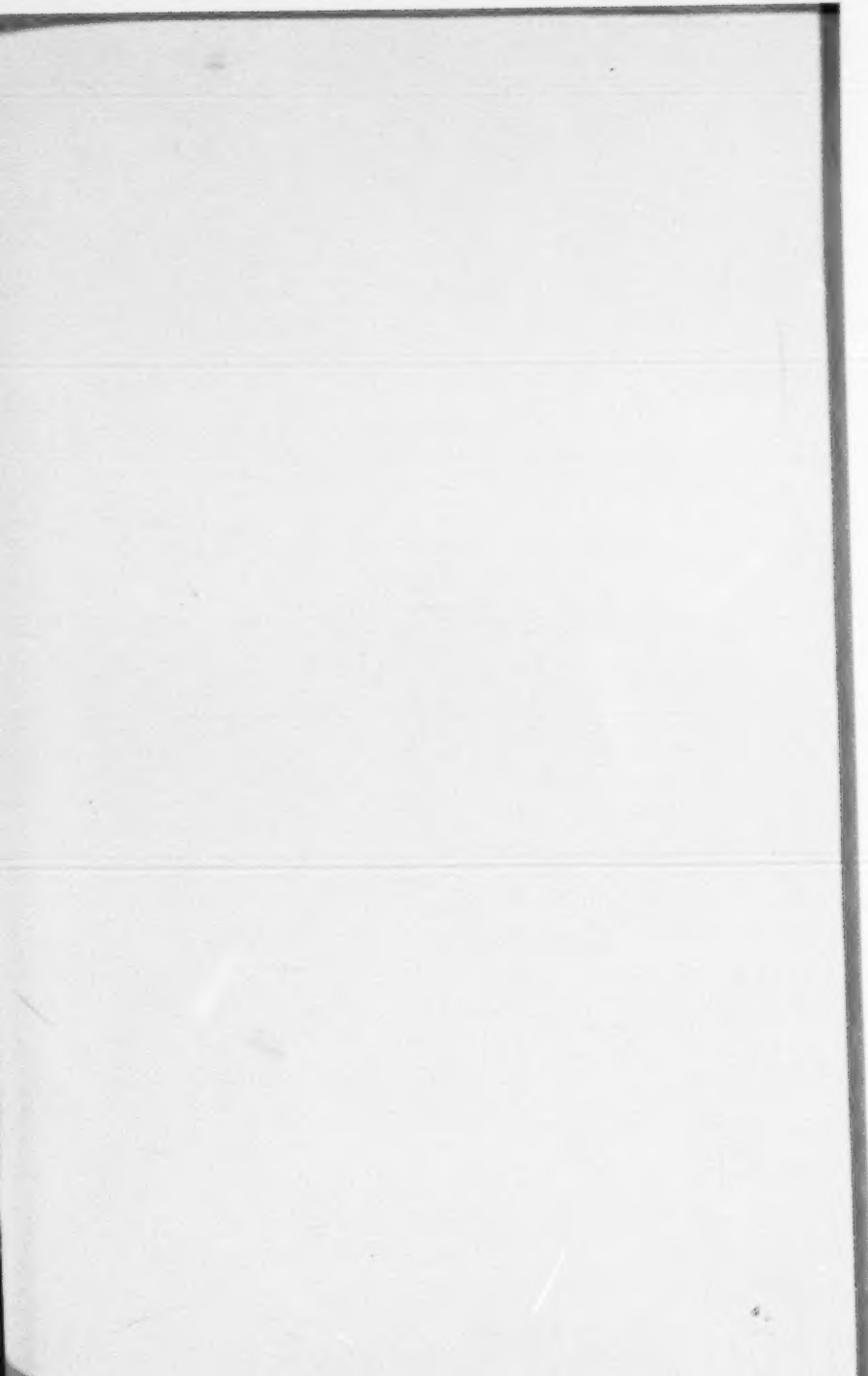
KURT EMIL BRUNO MOLZAHN,
Defendant,

By

FRANCIS FISHER KANE,
JAMES W. CARPENTER,
CYRIL COLEMAN,
His Attorneys.

Service of the within is hereby admitted this 27th day of November, 1942.

Attorneys for Plaintiff.



UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

United States of America,
Appellee,

against

Anastase A. Vonsiatsky,
Gerhard Wilhelm Kunze,
Wolfgang Ebell,
Otto Willumeit,

Defendants,

and

Kurt Emil Bruno Molzahn,
Defendant-Appellant.

OPINION OF THE COURT OF APPEALS.

(Filed April 2, 1943)

Before SWAN, HAND and CLARK, *Circuit Judges.*

AUGUSTUS N. HAND, *Circuit Judge:*

The defendant Molzahn was convicted in the United States District Court for the District of Connecticut of conspiring unlawfully to disclose information affecting national defense in violation of Section 2 (a) and 4 of the Espionage Act of June 15, 1917, c. 30, Title 1, 40 Stat. 217 (50 U. S. C. Sections 32 and 34). The portions of the Act which are applicable are quoted in the margin.¹

¹ Sec. 32. *Unlawfully disclosing information affecting national defense.* Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appli-

The indictment charged that continuously from January 1, 1941, to "on or about the sixth day of December 1941" the defendant Molzahn and the defendants Vonsiatsky, Kunze, Ebell and Willumeit conspired with one another and with divers other persons to the grand jurors unknown to communicate and transmit to the foreign governments of Germany and Japan and the representatives of those governments, documents, writings, plans, notes and information relating to the national defense of the United States and particularly to transmit information as to the numbers, personnel, disposition, equipment, arms and morale of its army, navy and air force, with intent and reason to believe that the information would be used to the injury of the United States and to the benefit of Germany and Japan.

All the defendants, other than Molzahn, pleaded guilty and were sentenced—Vonsiatsky and Willumeit for five years, Ebell for ten years, and Kunze for fifteen years. Molzahn was found guilty by the jury after a four weeks trial and was sentenced for ten years. He has appealed on the ground that the evidence was insufficient to show his participation in the conspiracy, that there were errors on the part of the trial judge in the admission of evidence and that he was not afforded a fair trial. In our opinion the evidence against him was substantial and justified the jury in rendering its verdict and he had a fair trial.

ance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years:

(The rest of the Section applies to offenses committed in time of war.)

Sec. 34. *Conspiracy to violate preceding sections.* If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of Title 18. * * *

To obtain a proper understanding of the evidence relied on by the government it is necessary to give a brief outline of the activities of the defendants, other than Molzahn, who beyond any question were shown to have been engaged in a conspiracy to accumulate and furnish to Germany and Japan information relating to the military resources of the United States.

Vonsiatsky was the leader of the Russian National Revolutionary Party, the object of which was to help the Russian people to change the Bolshevik Government. Kunze was born in the United States but had become a subject of the German Reich in the autumn of 1941 just before the attack of the Japanese on Pearl Harbor and was an active member of the Bund. Ebell was a physician who had been born in Alsace, lived at El Paso, Texas, where he practiced medicine, and had become an American citizen. He, too, was a member of the Bund and an associate of Kunze. Willumeit was a Chicago restaurateur and likewise a member of the Bund. He had received a German education and was a graduate in medicine from the University of Bonn. The appellant Molzahn was the pastor of Old Zion Lutheran Church in Philadelphia. He was born in Germany and educated there. He served in the German Cavalry on the Russian front in the last war. In 1924 he received a call to a pastorate from a Lutheran Church in Johnstown, Pennsylvania, where he worked until May, 1929. He is a man of evident ability who has become well known in Philadelphia. His church there was a very old one; he increased the congregation, acquired many friends and gained a decided reputation as a preacher and public speaker. It may be hard to suppose that zeal for the Fatherland, or the influence of wrongheaded associates, sometimes so overpowering, would have led a man of Molzahn's excellent abilities and high calling to participate in a conspiracy against the

country of his adoption. But an outline of the evidence which persuaded the jury that he was a participant seems to justify its verdict.

A government witness named Flatter testified that he was a fellow passenger of Molzahn on the Europa, sailing for Bremen in July, 1937. He said that Molzahn wore a Nazi emblem on the steamer and told him that he ought to join the Nazi party. Flatter had lost his position in Germany because of speeches against Hitler and membership in the Socialist Party of Dr. Stressmann. Molzahn offered to assist him in re-establishing himself and gave him a card to G. Behrensmann, a brother-in-law of Mrs. Molzahn and a legal adviser to the Gestapo, in order that the latter might aid him. Molzahn also told Flatter that he was going to Berlin to have conferences with "higher-ups." There was proof that Molzahn was very friendly with a pronounced Nazi in Philadelphia named Kessemeier, though Bishop Pfatteicher, the head of the Lutheran Synod in 1938, cautioned him to avoid the intimacy. Moreover in 1939 Molzahn discussed with Pfatteicher the question of his naturalization and of his loyalty to the United States and on that occasion said that he found it rather difficult to have any supreme loyalty "having been a German so long and having relatives of his wife in England, and also having this home of his with his kiddies in America." To the foregoing may be added the fact that Molzahn seems to have been known among Bund members as friendly to them and when his premises were searched photographs of Hitler and Goebbels, a Nazi pennant, as well as various documents of the German propaganda agencies were found in a closet in the house. In an address in 1934 he made statements in which he commended the Hitler regime and in the year 1937 held a service in his church in memory of Germans who lost their lives in the last war at which representatives of the Bund were present in uniform and presented a wreath to be laid on the altar of the church.

Toward the end of March, 1941, Pelypenko, a Roman Catholic priest of the Ukrainian Rite, came to this country from Buenos Aires and entered the service of the Federal Bureau of Investigation. He was sent to the United States by the American Embassy in The Argentine. While in The Argentine he had furnished secret information to the British Intelligence and the American Embassy. In April, 1941, he met Willumeit in a Ukrainian restaurant in Chicago. Apparently about the same time he called on the German Consul in Philadelphia and said that he desired to become acquainted with people who were aiding the German propaganda. The Consul told him that Molzahn was "one of our most important co-workers," was "one of the closest co-workers of the German Consulate," and gave him a card on which was the name and Philadelphia address of Molzahn. About the middle of May, 1941, Pelypenko called on Molzahn and asked to be connected "with the German Embassy in Washington." Molzahn said that he knew Baron von Geinanth of the Embassy but would ask to have the introduction made by "another co-worker Pastor Evers in Baltimore" and said: "Pastor Evers is working with the Embassy just as well as Pastor Molzahn." Pelypenko then asked Molzahn what he thought about "the aid of the Ukrainians in the German aims" and the latter replied:

" * * * Ukrainian aid may be directed in three directions. * * * First direction: propaganda against war and against the warring authorities in Washington. Secondly: to lead propaganda mongst Ukrainians concerning independence of the Ukraine. Thirdly: to give information about factories and military equipment."

The day after the visit to Molzahn in May Pelypenko called on Pastor Evers in Baltimore, told him that he had come from The Argentine, financed by the German govern-

ment, in order to work among the Ukrainians of America and asked whether Evers could not establish contact for him with the German Embassy. Evers gave him the address of the German Consulate in Baltimore but refused to do more. Pelypenko went to the Consul there who called up the Embassy in Washington. Pelypenko went to Washington and had a conversation, at which Molzahn was discussed, with von Haydn, the Secretary of the Embassy, at the Hotel Harrington.

In June or early July, 1941, Pelypenko met Kunze at the office of the Bund in New York, having been given an introduction through a letter from Willumeit. About July 26, 1941, Pelypenko met Kunze, Vonsiatsky and Willumeit at the Hotel Bismarck in Chicago. He testified that between the first of April and some time in August he spent three-fourths of his time in that city. During the meeting at the Bismarck Vonsiatsky stated that he had accumulated information concerning the location of the American army, fleet and aviation force for a Japanese agent, who was expected to arrive on the Tatuta Maru; also that the information would be taken by Kunze to South America, who thereafter would try to visit Berlin. Kunze said that Molzahn was his co-worker in Philadelphia, that he expected Pelypenko to help Kunze to get a document for the trip to Europe, and that he would write Molzahn and ask him to see Pelypenko and do whatever he asked. Kunze also said at the Chicago meeting that the information was about the military position of the United States and would be given him by Vonsiatsky, Willumeit and other co-workers. He added that in view of his possible trip to Europe he was afraid to go through the English blockade with an American passport and would like to have some other document—Polish or Czech or some other one that would enable him to pass through “as an ally.” At the Chicago meeting

Kunze gave Pelypenko \$50 upon the promise that the latter would aid him in getting a passport.

On July 31, 1941, Kunze sent a letter to Pelypenko at the Hotel Bristol in New York which bore on the back flap the words "K c/o Rev. Molzahn, Zion Luth. Church, Franklin Square, Phila. Pa." The envelope contained two small passport photographs of Kunze and was followed by a similar letter postmarked August 2, 1941, directed to Pelypenko at the Hotel Bristol, containing three larger photographs and having a like forwarding address to Molzahn on the back flap. These letters were received by Pelypenko at New York, who had arrived there from Chicago. There was proof indicating that Kunze in the meantime had written Molzahn about the plan for obtaining passports (Rec. p. 23) though Kunze claimed that his letter was merely one of introduction and Molzahn denied that he ever received such a communication.

After receiving the first of the two letters containing the photographs Pelypenko called to see Molzahn at his office in Philadelphia but found him on vacation and left with his assistant the two small photographs of Kunze which were mailed with the first letter to the Hotel Bristol. On receiving the second letter he again called on Molzahn found him still absent and left at the office two of the three larger photographs contained in the second letter, retaining the third himself. He returned about six weeks later and found Molzahn who said that "he received a letter from Kunze and did what he could." When Pelypenko showed him the envelope that had contained the small photographs and bore the forwarding address he said Kunze was "a good man, but * * * not careful" and "a dunce." He tore off the address on the black flap and told Pelypenko "to be careful with it." Pelypenko then asked how he could communicate with Kunze and was given a slip of paper with the address

in El Paso, Texas, of the defendant Dr. Ebell, who was a member of the Bund and afterwards helped Kunze across the Mexican border. When Pelypenko said Kunze "expects to leave," Molzahn replied: "Yes, I know." Pelypenko also said: "this business was very important, because he has with him important papers," to which Molzahn replied: "That I know."

After the first two visits to Philadelphia in August, 1941, at which Pelypenko failed to meet Molzahn he went to Thompson, Connecticut, to see Vonsiatsky who said to him that he was sending Kunze with important papers and asked Pelypenko to help and "if possible, * * * go with him across the border line, and in any case, take these papers into my own pocket." Vonsiatsky at that time gave Pelypenko a card of introduction to a General of the Japanese Army and asked him to obtain from the Japanese Embassy the name and address of the female emissary who had been expected in America and was "a very important espionage agent of the Japanese staff." Pelypenko at once went to the Japanese Embassy and was told by the attache that he did not yet know the whereabouts of the espionage agent but that it was necessary to make a contact with the military establishment in Washington and that he would like to talk to Vonsiatsky. He also said that he was interested in knowing "whether airplanes are being sent through Alaska to Russia. If so how many." Pelypenko returned to Thompson, Connecticut, reported the interview to Vonsiatsky, who gave him a card on which was written the address of a co-worker in Brazil. When asked by Pelypenko as to how he could help to get the information out of the country Vonsiatsky said, because Pelypenko was a priest, he could take things with him across the border and accordingly should accompany Kunze. Vonsiatsky had previously furnished Kunze with \$2800 to defray expenses.

Early in October, 1941, Kunze and Willumeit made an extensive tour through the northwest United States and the Pacific Coast during which Kunze obtained a knowledge of shipping facilities, coastal fortifications, points of landing, military installations and naval defenses, compared them with those of the East Coast and discussed the lend-lease in the West Indies. Their route finally extended to El Paso, Texas, where they visited Ebell who drove Kunze across the Mexican border to Juarez to see a brew master named Ferdinand Goeldner whom he was anxious to meet and later, in a letter dated December 8, 1941 (Gov. Exh. 35), asked to forward a letter to Vonsiatsky, which will be referred to hereafter. On Labor Day (1941) Kunze had been elected National Leader of the Bund, under a promise to his associates not to leave the country. While Willumeit and Kunze were at El Paso the former became suspicious that Kunze was not going to keep his promise but finally persuaded Kunze to return to Chicago. He did return with Willumeit about November 3, but after three days left for El Paso, crossed the Mexican border, finally reached the City of Mexico about November 11, 1941, and remained there until he was arrested upon the present charge and extradited to the United States. In January or February, 1942, Pelypenko visited Ebell's office at the address in El Paso which had been given him by Molzahn and was told by Ebell's assistant that Kunze was then in the City of Mexico.

On December 8, 1941, Kunze wrote Vonsiatsky from Mexico saying that he was in need of an additional \$1,000 for his expenses and asked the latter to send what he could to Ebell at El Paso. On the same date Kunze wrote another letter to Ebell enclosing the one to Vonsiatsky in which he asked Ebell to forward the first letter to Vonsiatsky. The letter to Vonsiatsky under date of December 8, 1941, dis-

closed that Kunze had given up the plan he had had of crossing the Atlantic by air. This information was supplemented by Kunze's testimony at the trial that he had a twenty-six foot boat in a Mexican fishing harbor loaded with food-stuffs in which he proposed to start on his European journey. He very likely expected to use the small boat only to reach a German submarine in the Carribean, though he swore he intended to cross the Atlantic in it.

It is true that Molzahn denied many of the facts we have recited and that the testimony of Kunze and other witnesses was inconsistent with some of them. It is also true that there were reputable witnesses from Philadelphia who testified to the high character of Molzahn and that much of his teaching and preaching would seem to be incompatible with the charge against him. Nevertheless it is reasonably clear that a substantial amount of testimony and inferences legitimately derivable from it point the other way. There was the strongest proof of a general conspiracy on the part of the other defendants to transmit military information to the enemy and to use Molzahn to facilitate their object. In view of the evidence, of his active interest in the German cause, of his statements to Flatter on the Europa, of the feeling of divided loyalty he expressed to Bishop Pfatteicher as late as 1939, and of his knowledge of just where Kunze was when Pelypenko obtained Kunze's address from him in El Paso, it is hardly surprising that the latter used Molzahn's Philadelphia office as a place to forward mail to Pelypenko. Pelypenko's story, if believed by the jury, as it must have been, showed that Molzahn was ready to help in obtaining a false passport while his objection to having Kunze's mail forwarded to his office which he made to Pelypenko, Gerhard Kunze and Pastor Schlick, indicated fear, caution, or consciousness of guilt, rather than a disinclination to facilitate the plans of the conspirators.

The crucial question is whether he knew that Kunze was directly or indirectly to transmit military information to Germany and Japan. We think that the jury could find that Molzahn had such knowledge. The fact that in May, 1941, he advised Pelypenko to help German aims by giving information about factories and military equipment shows a direct interest in German espionage activities. When Pelypenko stated that Kunze's "business was very important, because he has with him important papers," Molzahn said: "That I know." Molzahn's guarded reference of Pelypenko to Evers when Pelypenko desired to make a contact with the Germany Embassy would have seemed unnecessary for one not a participant in a questionable enterprise. His designation by the German Consul as an important co-worker and his selection by the co-conspirators as a proper man to aid their activities indicate a reliance on Molzahn by the conspirators unlikely to be accorded one not a dependable party to their schemes. Indeed, it was strange for Kunze to use Molzahn's office, instead of that of his own Pastor Schlick, as a forwarding address for letters to Pelypenko if he had not been dealing with a reliable confidante when so doing. All these things, added to the evidence of Molzahn's sympathy with the Nazi cause, including his suggestion to Bishop Pfatteicher of divided loyalty, made a substantial case for the government. They fitted into the framework of a conspiracy to transmit military information and justified the verdict of the jury and the refusal of the trial judge to set it aside.

We have thus far only discussed the merits which, in our opinion, support the judgment. But the appellant not only relies on insufficiency of proof of the charge against him but on errors said to have been committed in the course of the trial.

The first error alleged is that conversations relating to Molzahn, to which he was not a party, were admitted. These

conversations were at the Hotel Bismarck on July 26, 1941. They confessedly were competent evidence if there was proof aliunde that Molzahn was connected with the conspiracy, and for the reasons already stated we hold there was. This proof consisted largely of the testimony of Pelypenko, the credibility of which was a question for the jury, but it was strengthened by evidence of Molzahn's interest in the Nazi cause, of his expression to his Bishop of divided loyalty and of his readiness to act as a conduit for both Kunze and Pelypenko.

Appellant next questions the admissibility of Pelypenko's statement that he was told by Molzahn that he knew Kunze expected to leave and to take with him important papers on the ground that it was at best an admission by Molzahn and only competent if and when corroborated. It, however, was an admission made not after the crime was completed but in the course of the alleged conspiracy and accordingly did not have to be corroborated. *Warszower v. United States*, 312 U. S. 342, 347. Moreover, it was corroborated by the surrounding circumstances that we have related at length.

The next error claimed is the admission of two letters dated December 8, 1941, offered by the government. The first (Gov. Exh. 35) written by Kunze to "My dear Ferdinand and Wolf" asked that the second letter, which apparently was enclosed, be forwarded by air mail "from El Paso on" after they had read it "and, if desired, changed the address." The first letter went on to say: "But please be careful in taking the letter over the border. Should you get a reply then send mail or money from Juarez to Kurt per his name; he will then forward the things." "Ferdinand," to whom this was addressed, was the brew-master Goeldner of Juarez, whom Kunze went to see when he was in El Paso the last of October, 1941, and "Wolf" was the defendant Wolfgang Ebell. This letter was in German and had a postscript which was not offered by the government but later put in evidence on behalf of the defendant.

The postscript (Deft's Exh. R) was not in Kunze's handwriting and was signed "Kurt." According to the testimony the signer was "Kurt Tuermer," a friend of Goeldner's at Mexico City, and not Kurt Molzahn. The postscript apparently referred to Ferdinand Goeldner, one of the addressees of the letter (Gov. Exh. 35).¹

The second letter (Gov. Exh. 34)² was from Kunze to Vonsiatsky and signed under his alias "Wilhelm Gerharda-

¹ In translation, Exh. 35 reads as follows:

I have your postscript from Monterey. You could have come a little farther while you were about it and paid me a visit. I shall write you a longer letter within a few days, so that you may become informed as to what is going on here in all the time intervening.

Hearty greetings to all and to you.

Your Kurt.

² Gov. Exh. 34:

Mexico, Dec. 8th, 1941.

My dear Anastaszi Andreivich!

Roosevelt finally has what he thinks he wanted, but before long he will have "it" "in the neck." If the Japanese war had waited a few weeks more, I'd have been in Japan; as it is, I shall have gone on in another direction by the time this letter reaches you.

The *Atlantic crossing by air*, which I originally had in mind, would cost \$2,600.00 *more than I have now* and would require months of waiting. Another method of travel, *the only other one left open*, will require about \$1,000.00 *more than I have*. There can be no *going back* for me any more, and the farther away I go, the more difficult it will become to send me money.

Please send what you can to:

DR. WOLFGANG EBELL,
111 N. MESA,
EL PASO, TEX.

He is my very good friend and I have asked him to forward *money or mail* intended for me to another address. (Please do not use *my* name on money-orders or letters, but only *his*.) Do not write much, as his mail may be censored. * * *

H. H.!

Your

Wilhelm Gerhardavich

vich." It was to be forwarded by Goeldner and Ebell and contained a request for the advance of an additional \$1,000 which we have alluded to previously. It is argued on behalf of the plaintiff that the admission of the letter in which "Kurt" is mentioned as a person to whom Goeldner should forward to Kunze the additional money to be received from Vonsiatsky was erroneous and so prejudicial to Molzahn as to alone require a reversal of the judgment. But we cannot say that it was not proper to admit the letter in evidence. Before the identity of the "Kurt" mentioned in the letter with Molzahn was disproved, it was possible to believe that the letter referred to to Molzahn since his name was Kurt and he had already been implicated in the conspiracy if the jury believed the testimony of Pelypenko. When it was shown that the Kurt referred to in Government's Exhibit 35 and the signer of the postscript was not Molzahn, the latter, if he feared that the reference was prejudicial, should have moved to strike out the letter mentioning "Kurt," or should have asked the court to charge that there was no proof that Molzahn was the person referred to. It seems to us that all connection of Molzahn with the proposed forwarding of the \$1,000 from Vonsiatsky to Kunze was so thoroughly disproved that we cannot regard the admission of the letter about "Kurt" seriously. So far as the letter showed the continuance of a conspiracy and the different plans of Kunze to leave the country in furtherance of the plan to aid the enemy it must be regarded as on a par with other acts of those shown to have been engaged in a conspiracy from which it was not shown that Molzahn, if implicated, had withdrawn.

Finally, appellant's counsel makes a general complaint that he did not have a fair trial. We have carefully examined the testimony and find the conduct of the trial not only fair but scrupulous to protect the defendant's rights

and unusually competent. While we must regret that a man of the talent and apparent general good purposes in life of Molzahn should be convicted of participation in a conspiracy which so far as the proof shows was originally hatched out by the other defendants, and while it may be that the testimony of the informer Pelypenko was false as to Molzahn's admission, and while it is possible that Molzahn, though sympathetic with the Nazi cause, never became aware that he was proposing to aid in facilitating transmission of military information to the enemy, yet we think there was substantial evidence to the contrary. Accordingly the question of his knowing participation must be left with the tribunal having the duty to determine the guilt or innocence of persons charged with violation of law.

For the foregoing reasons the judgment of conviction is affirmed.